Whatever Means Necessary

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The law of evidence has become increasingly important to tax advisers, particularly in the light of the recent and dramatic spate of Inland Revenue raids on accountants and solicitors. Whether or not documents are subject to legal professional privilege is one issue (see John Walters Q.C. and Hugh McKay in issue 425). Another issue is the improper seizure of documents by the Inland Revenue or Customs & Excise in the course of such raids. We will discuss whether, as a general rule, evidence must be excluded from subsequent proceedings because it was obtained illegally: for example, by a tort, an infringement of procedural regulations, or even in contempt of court.

Illegally obtained evidence

> "It matters not how you get it if you steal it even, it would be admissible in evidence." (per Crompton J in R. v. Leatham (1861) 8 Cox CC 498 at 501).

English law is firmly on the side of the admissibility of evidence obtained illegally or as a result of an illegal search. This view seems to arise because the administration of justice will be obstructed where otherwise

relevant evidence would not be admissible. There is therefore no rule of law that such evidence must be excluded simply because it has been obtained illegally or improperly. As the authorities make clear, the test for the admissibility of evidence is relevance: relevant evidence, even if illegally obtained is admissible.

In other words, if the evidence is admissible, the Court will not concern itself with how the evidence was obtained, or more precisely the legitimacy of the means - see in criminal cases for example, Kuruma v. R. [1955] AC 197, R. v. Sang [1980] AC 402 and R. v. Khan [1994] NLJR 863. This stance is also emulated by the civil courts: it can be seen that they have no discretion to exclude evidence on the ground that it was unlawfully obtained: Helliwell v. Piggott-Sims [1980] FSR 582.

As far as privileged documents are concerned, Calcraft v. Guest [1898] 1 QB 759 (regarded as one of the leading authorities in this area) held that if a privileged document comes into the hands of the other party it is admissible. This is so even if it has been obtained by improper means, and thus is consistent with the general rule that the Court has no power to exclude relevant evidence, even though it has been unlawfully or improperly obtained. The importance of not voluntarily disclosing privileged material cannot be too highly stressed.

The judicial approach to a flagrant disregard and breach of rules of procedure in the conduct of enquiries and the collection of evidence is, at first sight, somewhat disconcerting. However, to say that the mere fact that evidence has been obtained through an illegal search will not as a matter of law exclude it, still leaves open the question of whether and to what extent a court may, at its discretion, exclude evidence.

By way of introduction to the next part of this article, it should be emphasised that there is a distinction between criminal and civil law on this issue. Given the fact that the powers of search and seizure are likely to be exercised in relation to cases involving tax frauds (thereby giving rise to potentially both criminal and civil proceedings) it is necessary to examine the position in relation to both.

Criminal Cases

The House of Lords in R. v. Sang considered the issue of the discretion of a trial judge to exclude evidence which had been obtained unfairly. The thrust of the judgments is that at common law a court does not have a discretion to exclude illegally or improperly obtained evidence unless its probative value is outweighed by its prejudicial effect. Lord Diplock makes it clear that, at least in the context of a criminal trial, the function of the judge in relation to the admission of evidence is to ensure that the fairness of the trial is maintained. He went on to state that it is no part of the judge's function to

exercise disciplinary powers, particularly as there will be a remedy in civil law if the evidence is obtained illegally.

The discretion described in R. v. Sang is very limited and it is apparent that it will only be exercised in a narrow range of circumstances, where the probative value is outweighed by the prejudicial effect. However, the common law position has since been superseded by the Police and Criminal Evidence Act 1984 (the P&CE Act 1984) and we feel that R. v. Sang must now be read in the light of this Act. The relevant provisions are s.78 and s.82(3):

> s.78(1) In any proceedings the Court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the Court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.
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> (2) Nothing in this section shall prejudice any rule of law requiring a Court to exclude evidence.
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> s.82(3) Nothing in this part of this Act shall prejudice any power of a Court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.

Whilst s.82(3) is thought to preserve the common law position, s.78 makes specific reference to the circumstances in which the evidence was obtained. In R. v. Khan Lord Taylor CJ stated that s.78 is at least as wide as the common law so that it is only necessary to consider s.78. However, this does not aid matters much. The provision is cast in such vague and general terms that it offers little guidance. That said, s.78 certainly allows for a harder line to be taken on the exclusion of illegally obtained evidence than at common

law. It seems that under this provision, such evidence can be excluded at the Court's discretion if it took the view that its proceedings had become unfair by virtue of an abuse of process, for example, because evidence has been obtained in deliberate breach of procedures.

There are three stages in the application of s.78(1):

(1) The Court must have regard to "all the circumstances, including the circumstances in which the evidence was obtained";

(2) The Court must consider whether it appears that the admission of the evidence would have such an adverse effect that it ought not to be admitted; and

(3) The Court may, if it considers it would have such an effect, exclude the evidence.

When the section is broken down like this, it can be seen how strangely phrased it is - whilst it imports a discretion into s.78, it would be odd to conclude that evidence ought not to be admitted and then to admit it by failing to exercise the discretion. Stage 2 of the enquiry involves a consideration of the effect of the admission of the evidence on the fairness of the proceedings. The interests of the individual and the interests of the prosecution will be

relevant factors, but in R. v. Samuel (1988) 87 Cr. App. R 232 the Court of Appeal said:

> "It is undesirable to attempt any general guidance as to the way in which a judge's discretion under s.78 or his inherent power should be exercised".

On this basis it is extremely difficult to predict which way a Criminal Court will go on issues of admissibility. So far, there is little to indicate that the judiciary is adopting a more rigorous attitude as a result of s.78, and so it appears that illegally obtained evidence will generally be admissible in criminal cases.

Civil Cases

Most civil tax cases are appeals and so the admissibility of evidence in such cases is a matter for the Special, or General, Commissioners (Jurisdiction & Procedure) Regulations 1994 (SI 1994/1811 & 1994/1812 respectively and the VAT Tribunal Rules 1986 (SI 1986/590). We will come to those provisions after a brief examination of the general rule in civil cases.

The civil law position seems, on the basis of decisions like Helliwell v. Piggott-Sims and Calcraft v. Guest, exceptionally wide as well. It should be noted that here there is no authority for the exclusion of evidence on the ground that its prejudicial effect outweighs its probative value, unlike in criminal law. However, the scope of the general rule that improperly obtained

evidence is admissible has been somewhat narrowed recently. In I.T.C Film Distributors Limited v. Video Exchange Limited [1982] Ch. 431 Warner J held that public policy requires that a litigant should not be permitted to make use of a copy of a privileged document as evidence, where he has obtained it by stealth or a trick, or otherwise acted improperly. In addition there is dicta in Warner J's judgment to the effect that where documents are obtained in contempt of court, the Court should not vindicate it by admitting such documents in evidence. This decision would, we feel, be relevant in the context of the wide inclusionary rules in tax appeals (see below).

Furthermore, Lord Ashburton v. Pape [1913] 2 Ch. 469 is authority for the proposition that where a document has been improperly obtained the Court will at the suit of the owner of the document order the document to be returned and will restrain the offending party in its use of the information contained in the document. Another alternative might be to seek an injunction, perhaps as part of judicial review proceedings, restraining the use of information contained in such documents. In exercising its discretion the Court will balance the interests of the party to whom the document belongs, against the interests of the party seeking to make use of it. The circumstances in which the document comes into the hands of the latter party will be relevant to determining in whose favour the balance lies: trick or fraud being distinguished from mistake or carelessness (Webster v. James Chapman & Co [1989] 3 All ER 939). Generally speaking though, in civil cases, where the

Court is deliberating on the application of the general rule, it will carry out a balancing act and weigh up the various interests in issue.

It should be noted that the equitable relief referred to above is not available in criminal proceedings brought by the State - this is illustrated by Butler v. Board of Trade [1971] Ch.680 and R. v. Tompkins (1977) 67 Cr. App 181. Quite why the public policy principles underlying the decisions in I.T.C. Film Distributors and Lord Ashburton should be so readily superseded in criminal proceedings is not clear. However, in the light of s.78 P&CE Act 1984 and the discretion it confers, perhaps the gulf between civil and criminal proceedings is not quite so wide as it initially seems.

Tax Appeals

The Special and General Commissioners' power to hear evidence is contained in rule 17(6) or 15(6) respectively of their procedural regulations. The rules state that they may receive evidence of any fact which appears to them to be relevant notwithstanding that it would be inadmissible in a court of law. The word "may" is important: it is not "must" and we feel that the Commissioners are not obliged to receive illegally obtained evidence. Indeed, we would go further - we suggest that they should not receive evidence which a civil court, following the above authorities, would not receive.

The VAT Tribunal has a differently worded power. Rule 28(1) states that the Tribunal shall not refuse evidence tendered to it only on the grounds that it would be inadmissible in a court of law. However, illegally obtained evidence is not of itself inadmissible, quite the contrary. It is only excluded by the civil courts in pursuance of their own inherent powers. Again, we feel that the VAT Tribunal should emulate the approach of the civil Courts in appropriate cases.

Conclusion

The admissibility of improperly obtained evidence is largely a matter of discretion. Courts and tribunals must attempt to reconcile two conflicting positions: on the one hand, there is no general rule that such evidence is inadmissible. On the other hand, they should be careful not to encourage illegal methods of gathering evidence. Admitting such evidence is at least a toleration of those methods and at most a vindication. Improper practices in obtaining evidence should be considered intolerable at any expense.

However, that said, we start from the position that such evidence is admissible. Under English law, whilst the interest of the individual against the wrongful invasion of and interference with his or her liberty is acknowledged, the general rule is based on the interests of the state in enforcing the law and not being unduly hampered in that task by the rules of evidence. This position undoubtedly prefers the state. Arguably the Court's discretion does not go far

enough to limit the doctrine that improperly obtained evidence is admissible and ensure that the interests of the individual are not extinguished or that the authorities are offered a positive incentive to conduct investigations by illegal methods.

The choice of the English Courts to adopt this practice of the prima facie inclusion of improperly obtained evidence is not reflected by all of the other jurisdictions. In Scotland, where, it should be remembered, a VAT Tribunal and General and Special Commissioners also sit, such evidence is excluded unless excuse for its admissibility is accepted. This inclusionary discretion would certainly seem to indicate that a more liberal stance will be adopted across the border. Likewise in the United States, illegally obtained evidence is, in principle, excluded.

We think that this approach should be preferred. Both as a matter of unfairness to the individual and as a matter of the public interest in adherence to the proper methods of search and investigation, illegally obtained evidence should be prima facie excluded. What is worrying and objectionable is not the English Courts' concern for the administration of justice, but what counts as the administration of justice: rather than justice best being served by the prima facie inclusion of such evidence, we suggest that it would be better served by its prima facie exclusion.